§11-265-117 Post-closure care and use of property.

(a)(1) Post-closure care for each hazardous waste management unit subject to the requirements of sections 11-265-117 through 11-265-120 must begin after completion of closure of the unit and continue for thirty years after that date. It must consist of at least the following:

(i) Monitoring and reporting in accordance with the requirements of subchapters F, K, L, M, and N; and

(ii) Maintenance and monitoring of waste containment systems in accordance with the requirements of subchapters F, K, L, M, and N.

(2) Any time preceding closure of a hazardous waste management unit subject to post-closure care requirements or final closure, or any time during the post-closure period for a particular hazardous waste disposal unit, the director may:

(i) Shorten the post-closure care period applicable to the hazardous waste management unit, or facility, if all disposal units have been closed, if he finds that the reduced period is sufficient to protect human health and the environment (e.g., leachate or ground-water monitoring results, characteristics of the hazardous waste, application of advanced technology, or alternative disposal, treatment, or re-use techniques indicate that the hazardous waste management unit or facility is secure); or

(ii) Extend the post-closure care period applicable to the hazardous waste management unit or facility, if he finds that the extended period is necessary to protect human health and the environment (e.g., leachate or ground-water monitoring results indicate a potential for migration of hazardous wastes at levels which may be harmful to human health and the environment).

(b) The director may require, at partial and final closure, continuation of any of the security requirements of section 11-265-14 during part or all of the post-closure period when:

(1) Hazardous wastes may remain exposed after completion of partial or final closure; or

(2) Access by the public or domestic livestock may pose a hazard to human health.

(c) Post-closure use of property on or in which hazardous wastes remain after partial or final closure must never be allowed to disturb the integrity of the final cover, liner(s), or any other components of the containment system, or the function of the facility's monitoring systems, unless the director finds that the disturbance:

(1) Is necessary to the proposed use of the property, and will not increase the potential hazard to human health

or the environment; or

(2) Is necessary to reduce a threat to human health or the environment.

(d) All post-closure care activities must be in accordance with the provisions of the approved post-closure plan as specified in section 11-265-118. [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.117)

§11-265-118 Post-closure plan; amendment of plan. (a) Written plan. The owner or operator of a hazardous waste disposal unit must have a written post-closure plan. An owner or operator of a surface impoundment or waste pile that intends to remove all hazardous wastes at closure must prepare a post-closure plan and submit it to the director within ninety days of the date that the owner or operator or director determines that the hazardous waste management unit or facility must be closed as a landfill, subject to the requirements of sections 11-265-117 through 11-265-120.

(b) Until final closure of the facility, a copy of the most current post-closure plan must be furnished to the director upon request, including request by mail. In addition, for facilities without approved post-closure plans, it must also be provided during site inspections, on the day of inspection, to any officer, employee or representative of the department who is duly designated by the director. After final closure has been certified, the person or office specified in paragraph (c)(3) must keep the approved post-closure plan during the post-closure period.

(c) For each hazardous waste management unit subject to the requirements of this section, the post-closure plan must identify the activities that will be carried on after closure of each disposal unit and the frequency of these activities, and include at least:

(1) A description of the planned monitoring activities and frequencies at which they will be performed to comply with subchapters F, K, L, M, and N during the post-closure care period; and

(2) A description of the planned maintenance activities, and frequencies at which they will be performed, to ensure:

(i) The integrity of the cap and final cover or other containment systems in accordance with the requirements of subchapters K, L, M, and N; and

(ii) The function of the monitoring equipment in accordance with the requirements of subchapters F, K, L, M, and N; and

(3) The name, address, and phone number of the person or office to contact about the hazardous waste disposal unit or facility during the post-closure care period.

(d) Amendment of plan. The owner or operator may amend the post-closure plan any time during the active life of the facility or during the post-closure care period. An owner or operator with an approved post-closure plan must submit a written request to the director to authorize a change to the approved plan. The written request must include a copy of the amended post-closure plan for approval by the director.

(1) The owner or operator must amend the post-closure plan whenever:
   (i) Changes in operating plans or facility design affect the post-closure plan, or
   (ii) Events which occur during the active life of the facility, including partial and final closures, affect the post-closure plan.

(2) The owner or operator must amend the post-closure plan at least sixty days prior to the proposed change in facility design or operation, or no later than sixty days after an unexpected event has occurred which has affected the post-closure plan.

(3) An owner or operator with an approved post-closure plan must submit the modified plan to the director at least sixty days prior to the proposed change in facility design or operation, or no more than sixty days after an unexpected event has occurred which has affected the post-closure plan. If an owner or operator of a surface impoundment or a waste pile who intended to remove all hazardous wastes at closure in accordance with subsection 11-265-228(b) or 11-265-258(a) is required to close as a landfill in accordance with section 11-265-310, the owner or operator must submit a post-closure plan within ninety days of the determination by the owner or operator or director that the unit must be closed as a landfill. If the amendment to the post-closure plan is a Class 2 or 3 modification according to the criteria in section 11-270-42, the modification to the plan will be approved according to the procedures in subsection (f).

(4) The director may request modifications to the plan under the conditions described in paragraph (d)(1). An owner or operator with an approved post-closure plan must submit the modified plan no later than sixty days of the request from the director. If the amendment to the plan is considered a Class 2 or 3 modification according to the criteria in section 11-270-42, the modifications to the post-closure plan will be approved in accordance with the procedures in subsection (f). If the director determines that an owner or operator of a surface impoundment or waste pile who intended to remove all hazardous wastes at closure must close the facility as a landfill, the owner or operator must

submit a post-closure plan for approval to the director within ninety days of the determination.

(e) The owner or operator of a facility with hazardous waste management units subject to these requirements must submit his post-closure plan to the director at least one-hundred and eighty days before the date he expects to begin partial or final closure of the first hazardous waste disposal unit. The date he ``expects to begin closure'' of the first hazardous waste disposal unit must be either within thirty days after the date on which the hazardous waste management unit receives the known final volume of hazardous waste or, if there is a reasonable possibility that the hazardous waste management unit will receive additional hazardous wastes, no later than one year after the date on which the unit received the most recent volume of hazardous wastes. The owner or operator must submit the post-closure plan to the director no later than fifteen days after:

(1) Termination of interim status (except when a permit is issued to the facility simultaneously with termination of interim status); or

(2) Issuance of a judicial decree or final order under HRS section 342J-7 to cease receiving wastes or close.

(f) The director will provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments on the post-closure plan and request modifications to the plan no later than thirty days from the date of the notice. He will also, in response to a request or at his own discretion, hold a public hearing whenever such a hearing might clarify one or more issues concerning a post-closure plan. The director will give public notice of the hearing at least thirty days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for the public to submit written comments, and the two notices may be combined.) The director will approve, modify, or disapprove the plan within ninety days of its receipt. If the director does not approve the plan he shall provide the owner or operator with a detailed written statement of reasons for the refusal and the owner or operator must modify the plan or submit a new plan for approval within thirty days after receiving such written statement. The director will approve or modify this plan in writing within sixty days. If the director modifies the plan, this modified plan becomes the approved post-closure plan. The director must ensure that the approved post-closure plan is consistent with sections 11-265-117 through 11-265-120. A copy of the modified plan with a detailed statement of reasons for the modifications must be mailed to the owner or operator.

(g) The post-closure plan and length of the post-closure care period may be modified any time prior to the end of the post-closure care period in either of the following two ways:

(1) The owner or operator or any member of the public may

petition the director to extend or reduce the post-closure care period applicable to a hazardous waste management unit or facility based on cause, or alter the requirements of the post-closure care period based on cause.

(i) The petition must include evidence demonstrating that:

(A) The secure nature of the hazardous waste management unit or facility makes the post-closure care requirement(s) unnecessary or supports reduction of the post-closure care period specified in the current post-closure plan (e.g., leachate or ground-water monitoring results, characteristics of the wastes, application of advanced technology, or alternative disposal, treatment, or re-use techniques indicate that the facility is secure), or

(B) The requested extension in the post-closure care period or alteration of post-closure care requirements is necessary to prevent threats to human health and the environment (e.g., leachate or ground-water monitoring results indicate a potential for migration of hazardous wastes at levels which may be harmful to human health and the environment).

(ii) These petitions will be considered by the director only when they present new and relevant information not previously considered by the director. Whenever the director is considering a petition, he will provide the owner or operator and the public, through a newspaper notice, the opportunity to submit written comments within thirty days of the date of the notice. He will also, in response to a request or at his own discretion, hold a public hearing whenever a hearing might clarify one or more issues concerning the post-closure plan. The director will give the public notice of the hearing at least thirty days before it occurs. (Public notice of the hearing may be given at the same time as notice of the opportunity for written public comments, and the two notices may be combined.) After considering the comments, he will issue a final determination, based upon the criteria set forth in paragraph (g)(1).

(iii) If the director denies the petition, he will send the petitioner a brief written response giving a reason for the denial.

(2) The director may tentatively decide to modify the

post-closure plan if he deems it necessary to prevent threats to human health and the environment. He may propose to extend or reduce the post-closure care period applicable to a hazardous waste management unit or facility based on cause or alter the requirements of the post-closure care period based on cause.

(i) The director will provide the owner or operator and the affected public, through a newspaper notice, the opportunity to submit written comments within thirty days of the date of the notice and the opportunity for a public hearing as in subparagraph (g)(1)(ii). After considering the comments, he will issue a final determination.

(ii) The director will base his final determination upon the same criteria as required for petitions under subparagraph (g)(1)(i). A modification of the post-closure plan may include, where appropriate, the temporary suspension rather than permanent deletion of one or more post-closure care requirements. At the end of the specified period of suspension, the director would then determine whether the requirement(s) should be permanently discontinued or reinstated to prevent threats to human health and the environment. [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.118)

§11-265-119 Post-closure notices. (a) No later than sixty days after certification of closure of each hazardous waste disposal unit, the owner or operator must submit to the local zoning authority, or the authority with jurisdiction over local land use, and to the director, a record of the type, location, and quantity of hazardous wastes disposed of within each cell or other disposal unit of the facility. For hazardous wastes disposed of before January 12, 1981, the owner or operator must identify the type, location and quantity of the hazardous wastes to the best of his knowledge and in accordance with any records he has kept.

(b) Within sixty days of certification of closure of the first hazardous waste disposal unit and within sixty days of certification of closure of the last hazardous waste disposal unit, the owner or operator must:

(1) Record, in accordance with State law, a notation on the deed to the facility property -- or on some other instrument which is normally examined during title search -- that will in perpetuity notify any potential purchaser of the property that:

(i) The land has been used to manage hazardous wastes;

and

(ii) Its use is restricted under Hawaii Administrative Rules, chapter 265, subchapter G regulations; and

(iii) The survey plat and record of the type, location, and quantity of hazardous wastes disposed of within each cell or other hazardous waste disposal unit of the facility required by section 11-265-116 and subsection (a) of this section have been filed with the local zoning authority or the authority with jurisdiction over local land use and with the director; and

(2) Submit a certification signed by the owner or operator that he has recorded the notation specified in paragraph (b)(1) and a copy of the document in which the notation has been placed, to the director.

(c) If the owner or operator or any subsequent owner of the land upon which a hazardous waste disposal unit was located wishes to remove hazardous wastes and hazardous waste residues, the liner, if any, and all contaminated structures, equipment, and soils, he must request a modification to the approved post-closure plan in accordance with the requirements of subsection 11-265-118(g). The owner or operator must demonstrate that the removal of hazardous wastes will satisfy the criteria of subsection 11-265-117(c). By removing hazardous waste, the owner or operator may become a generator of hazardous waste and must manage it in accordance with all applicable requirements of chapters 11-260 through 11-279. If the owner or operator is granted approval to conduct the removal activities, the owner or operator may request that the director approve either:

(1) The removal of the notation on the deed to the facility property or other instrument normally examined during title search, or

(2) The addition of a notation to the deed or instrument indicating the removal of the hazardous waste. [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.119)

§11-265-120 Certification of completion of post-closure care. No later than sixty days after the completion of the established post-closure care period for each hazardous waste disposal unit, the owner or operator must submit to the director, by registered mail, a certification that the post-closure care period for the hazardous waste disposal unit was performed in accordance with the specifications in the approved post-closure plan. The certification must be signed by the owner or operator and an independent registered professional engineer. Documentation supporting the independent registered professional engineer's certification must be furnished to the director upon request until he releases the owner or operator from the

financial assurance requirements for post-closure care under subsection 11-265-145(h). [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.120)

SUBCHAPTER H

FINANCIAL REQUIREMENTS

§11-265-140 Applicability. (a) The requirements of sections 11-265-142, 11-265-143 and 11-265-147 through 11-265-150 apply to owners or operators of all hazardous waste facilities, except as provided otherwise in this section or in section 11-265-1.

(b) The requirements of sections 11-265-144 and 11-265-146 apply only to owners and operators of:

(1) Disposal facilities;

(2) Tank systems that are required under section 11-265-197 to meet the requirements for landfills; and

(3) Containment buildings that are required under section 11-265-1102 to meet the requirements for landfills.

(c) The State and the federal government are exempt from the requirements of this subchapter. [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.140)

§11-265-141 Definitions of terms as used in this subchapter. (a) ``Closure plan'' means the plan for closure prepared in accordance with the requirements of section 11-265-112.

(b) ``Current closure cost estimate'' means the most recent of the estimates prepared in accordance with subsections 11-265-142(a), (b), and (c).

(c) ``Current post-closure cost estimate'' means the most recent of the estimates prepared in accordance with subsections 11-265-144(a), (b), and (c).

(d) ``Parent corporation'' means a corporation which directly owns at least fifty percent of the voting stock of the corporation which is the facility owner or operator; the latter corporation is deemed a ``subsidiary'' of the parent corporation.

(e) ``Post-closure plan'' means the plan for post-closure care prepared in accordance with the requirements of sections 11-265-117 through 11-265-120.

(f) The following terms are used in the specifications for the financial tests for closure, post-closure care, and liability coverage. The definitions are intended to assist in the understanding of these rules and are not intended to limit the meanings of terms in a way that conflicts with generally accepted

accounting practices.

``Assets'' means all existing and all probable future economic benefits obtained or controlled by a particular entity.

``Current assets'' means cash or other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business.

``Current liabilities'' means obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets or the creation of other current liabilities.

``Current plugging and abandonment cost estimate'' means the most recent of the estimates prepared in accordance with 40 CFR 144.62(a), (b), and (c).

``Independently audited" refers to an audit performed by an independent certified public accountant in accordance with generally accepted auditing standards.

``Liabilities'' means probable future sacrifices of economic benefits arising from present obligations to transfer assets or provide services to other entities in the future as a result of past transactions or events.

``Net working capital'' means current assets minus current liabilities.

``Net worth'' means total assets minus total liabilities and is equivalent to owner's equity.

``Tangible net worth'' means the tangible assets that remain after deducting liabilities; such assets would not include intangibles such as goodwill and rights to patents or royalties.

(g) In the liability insurance requirements the terms ``bodily injury'' and ``property damage'' shall have the meanings given these terms by applicable State law. However, these terms do not include those liabilities which, consistent with standard industry practice, are excluded from coverage in liability policies for bodily injury and property damage. The department intends the meanings of other terms used in the liability insurance requirements to be consistent with their common meanings within the insurance industry. The definitions given below of several of the terms are intended to assist in the understanding of these rules and are not intended to limit their meanings in a way that conflicts with general insurance industry usage.

``Accidental occurrence'' means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

``Legal defense costs'' means any expenses that an insurer incurs in defending against claims of third parties brought under the terms and conditions of an insurance policy.

``Nonsudden accidental occurrence'' means an occurrence which takes place over time and involves continuous or repeated

exposure.

``Sudden accidental occurrence'' means an occurrence which is not continuous or repeated in nature.

(h) ``Substantial business relationship'' means the extent of a business relationship necessary under applicable State law to make a guarantee contract issued incident to that relationship valid and enforceable. A ``substantial business relationship'' must arise from a pattern of recent or ongoing business transactions, in addition to the guarantee itself, such that a currently existing business relationship between the guarantor and the owner or operator is demonstrated to the satisfaction of the director. [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.141)

§11-265-142 Cost estimate for closure. (a) The owner or operator must have a detailed written estimate, in current dollars, of the cost of closing the facility in accordance with the requirements in sections 11-265-111 through 11-265-115 and applicable closure requirements in sections 11-265-178, 11-265-197, 11-265-228, 11-265-258, 11-265-280, 11-265-310, 11-265-351, 11-265-381, 11-265-404, and 11-265-1102.

(1) The estimate must equal the cost of final closure at the point in the facility's active life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan (see subsection 11-265-112(b)); and

(2) The closure cost estimate must be based on the costs to the owner or operator of hiring a third party to close the facility. A third party is a party who is neither a parent nor a subsidiary of the owner or operator. (See definition of parent corporation in subsection 11-265-141(d).) The owner or operator may use costs for on-site disposal if he can demonstrate that on-site disposal capacity will exist at all times over the life of the facility.

(3) The closure cost estimate may not incorporate any salvage value that may be realized with the sale of hazardous wastes, or non-hazardous wastes if applicable under subsection 11-265-113(d), facility structures or equipment, land, or other assets associated with the facility at the time of partial or final closure.

(4) The owner or operator may not incorporate a zero cost for hazardous wastes, or non-hazardous wastes if applicable under subsection 11-265-113(d), that might have economic value.

(b) During the active life of the facility, the owner or operator must adjust the closure cost estimate for inflation within sixty days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with

section 11-265-143. For owners and operators using the financial test or corporate guarantee, the closure cost estimate must be updated for inflation within thirty days after the close of the firm's fiscal year and before submission of updated information to the director as specified in paragraph 11-265-143(e)(3). The adjustment may be made by recalculating the closure cost estimate in current dollars, or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its Survey of Current Business, as specified in paragraphs (b)(1) and (b)(2). The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) The first adjustment is made by multiplying the closure cost estimate by the inflation factor. The result is the adjusted closure cost estimate.

(2) Subsequent adjustments are made by multiplying the latest adjusted closure cost estimate by the latest inflation factor.

(c) During the active life of the facility, the owner or operator must revise the closure cost estimate no later than thirty days after a revision has been made to the closure plan which increases the cost of closure. If the owner or operator has an approved closure plan, the closure cost estimate must be revised no later than thirty days after the director has approved the request to modify the closure plan, if the change in the closure plan increases the cost of closure. The revised closure cost estimate must be adjusted for inflation as specified in subsection (b).

(d) The owner or operator must keep the following at the facility during the operating life of the facility: The latest closure cost estimate prepared in accordance with subsections (a) and (c) and, when this estimate has been adjusted in accordance with subsection (b), the latest adjusted closure cost estimate. [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.142)

§11-265-143 Financial assurance for closure. By the effective date of these rules, an owner or operator of each facility must establish financial assurance for closure of the facility. He must choose from the options as specified in subsections (a) through (e).

(a) Closure trust fund.

(1) An owner or operator may satisfy the requirements of this section by establishing a closure trust fund which conforms to the requirements of this subsection and submitting an originally signed duplicate of the trust agreement to the director. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by

the State.

(2) The wording of the trust agreement must be identical to the wording specified in paragraph 11-264-151(a)(1), and the trust agreement must be accompanied by a formal certification of acknowledgment (for example, see paragraph 11-264-151(a)(2)). Schedule A of the trust agreement must be updated within sixty days after a change in the amount of the current closure cost estimate covered by the agreement.

(3) Payments into the trust fund must be made annually by the owner or operator over the twenty years beginning with the effective date of these rules or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter; this period is hereafter referred to as the ``pay-in period.'' Owners and operators who became subject to the regulations of 40 CFR Part 265 after April 7, 1982, shall make annual payments into the trust fund over a pay-in period of 20 years beginning from the date the owner or operator became subject to the regulations of 40 CFR 265, or over a pay-in period that equals the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter. Owners and operators who become subject to the regulations of this chapter after June 18, 1994, shall make annual payments into the trust fund over a pay-in period of 20 years beginning from the date the owner or operator becomes subject to the regulations of this chapter, or over a pay-in period that equals the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter. The payments into the closure trust fund must be made as follows:

(i) The first payment must be made by the effective date of these rules, except as provided in paragraph (a)(5). The first payment must be at least equal to the current closure cost estimate, except as provided in subsection (f), divided by the number of years in the pay-in period.

(ii) Subsequent payments must be made no later than thirty days after each anniversary date of the first payment. The amount of each subsequent payment must be determined by this formula:

$$\text{Next payment} = \frac{CE - CV}{Y}$$

where CE is the current closure cost estimate, CV is the current value of the trust fund, and Y is

the number of years remaining in the pay-in period.

(4) The owner or operator may accelerate payments into the trust fund or he or she may deposit the full amount of the current closure cost estimate at the time the fund is established. However, he or she must maintain the value of the fund at no less than the value that the fund would have if annual payments were made as specified in paragraph (a)(3).

(5) If the owner or operator establishes a closure trust fund after having used one or more alternate mechanisms specified in this section, his first payment must be in at least the amount that the fund would contain if the trust fund were established initially and annual payments made as specified in paragraph (a)(3).

(6) After the pay-in period is completed, whenever the current closure cost estimate changes, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within sixty days after the change in the cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current closure cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

(7) If the value of the trust fund is greater than the total amount of the current closure cost estimate, the owner or operator may submit a written request to the director for release of the amount in excess of the current closure cost estimate.

(8) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, he or she may submit a written request to the director for release of the amount in excess of the current closure cost estimate covered by the trust fund.

(9) Within sixty days after receiving a request from the owner or operator for release of funds as specified in paragraph (a)(7) or (a)(8), the director will instruct the trustee to release to the owner or operator such funds as the director specifies in writing.

(10) After beginning partial or final closure, an owner or operator or another person authorized to conduct partial or final closure may request reimbursements for partial or final closure expenditures by submitting itemized bills to the director. The owner or operator may request reimbursements for partial closure only if sufficient funds are remaining in the trust fund to

cover the maximum costs of closing the facility over its remaining operating life. No later than sixty days after receiving bills for partial or final closure activities, the director will instruct the trustee to make reimbursements in those amounts as the director specifies in writing, if the director determines that the partial or final closure expenditures are in accordance with the approved closure plan, or otherwise justified. If the director has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, he or she may withhold reimbursements of such amounts as he or she deems prudent until he or she determines, in accordance with subsection (h) that the owner or operator is no longer required to maintain financial assurance for final closure of the facility. If the director does not instruct the trustee to make such reimbursements, he or she will provide to the owner or operator a detailed written statement of reasons.

(11) The director will agree to termination of the trust when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The director releases the owner or operator from the requirements of this section in accordance with subsection (h).

(b) Surety bond guaranteeing payment into a closure trust fund.

(1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond which conforms to the requirements of this subsection and submitting the bond to the director. The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury.

(2) The wording of the surety bond must be identical to the wording specified in subsection 11-264-151(b).

(3) The owner or operator who uses a surety bond to satisfy the requirements of this section must also establish a standby trust fund. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with instructions from the director. This standby trust fund must meet the requirements specified in subsection (a), except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the director with the surety bond; and

(ii) Until the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these rules:
(A) Payments into the trust fund as specified in subsection (a);
(B) Updating of Schedule A of the trust agreement (see subsection 11-264-151(a)) to show current closure cost estimates;
(C) Annual valuations as required by the trust agreement; and
(D) Notices of nonpayment as required by the trust agreement.

(4) The bond must guarantee that the owner or operator will:
(i) Fund the standby trust fund in an amount equal to the penal sum of the bond before the beginning of final closure of the facility; or
(ii) Fund the standby trust fund in an amount equal to the penal sum within fifteen days after an administrative order to begin final closure issued by the director becomes final, or within fifteen days after an order to begin final closure is issued by a court of competent jurisdiction; or
(iii) Provide alternate financial assurance as specified in this section, and obtain the director's written approval of the assurance provided, within ninety days after receipt by both the owner or operator and the director of a notice of cancellation of the bond from the surety.

(5) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(6) The penal sum of the bond must be in an amount at least equal to the current closure cost estimate, except as provided in subsection (f).

(7) Whenever the current closure cost estimate increases to an amount greater than the penal sum, the owner or operator, within sixty days after the increase, must either cause the penal sum to be increased to an amount at least equal to the current closure cost estimate and submit evidence of such increase to the director, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current closure cost estimate decreases, the penal sum may be reduced to the amount of the current closure cost estimate following written approval by the director.

(8) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the director. Cancellation may not occur, however, during the one-

hundred and twenty days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the director, as evidenced by the return receipts.

(9) The owner or operator may cancel the bond if the director has given prior written consent based on his receipt of evidence of alternate financial assurance as specified in this section.

(c) Closure letter of credit.

(1) An owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter of credit which conforms to the requirements of this subsection and submitting the letter to the director. The issuing institution must be an entity which has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or State agency.

(2) The wording of the letter of credit must be identical to the wording specified in subsection 11-264-151(d).

(3) An owner or operator who uses a letter of credit to satisfy the requirements of this section must also establish a standby trust fund. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the director will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the director. This standby trust fund must meet the requirements of the trust fund specified in subsection (a), except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the director with the letter of credit; and

(ii) Unless the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these rules:

(A) Payments into the trust fund as specified in subsection (a);

(B) Updating of Schedule A of the trust agreement (see subsection 11-264-151(a)) to show current closure cost estimates;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The letter of credit must be accompanied by a letter from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: The EPA identification number, name, and address of the facility, and the amount of funds assured for closure of the facility by the letter of credit.

(5) The letter of credit must be irrevocable and issued for a period of at least one year. The letter of credit must provide that the expiration date will be automatically extended for a period of at least one year unless, at least one-hundred and twenty days before the current expiration date, the issuing institution notifies both the owner or operator and the director by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the one-hundred and twenty days will begin on the date when both the owner or operator and the director have received the notice, as evidenced by the return receipts.

(6) The letter of credit must be issued in an amount at least equal to the current closure cost estimate, except as provided in subsection (f).

(7) Whenever the current closure cost estimate increases to an amount greater than the amount of the credit, the owner or operator, within sixty days after the increase, must either cause the amount of the credit to be increased so that it at least equals the current closure cost estimate and submit evidence of such increase to the director, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current closure cost estimate decreases, the amount of the credit may be reduced to the amount of the current closure cost estimate following written approval by the director.

(8) Following an administrative or judicial determination pursuant to HRS section 342J-7 that the owner or operator has failed to perform final closure in accordance with the approved closure plan when required to do so, the director may draw on the letter of credit.

(9) If the owner or operator does not establish alternate financial assurance as specified in this section and obtain written approval of such alternate assurance from the director within ninety days after receipt by both the owner or operator and the director of a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the director will draw on the letter of credit. The director may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last thirty days of any such extension the director will draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this section and obtain written approval of such assurance from the director.

(10) The director will return the letter of credit to the issuing institution for termination when:
(i) An owner or operator substitutes alternate financial assurance as specified in this section; or
(ii) The director releases the owner or operator from the requirements of this section in accordance with subsection (h).

(d) Closure insurance.

(1) An owner or operator may satisfy the requirements of this section by obtaining closure insurance which conforms to the requirements of this subsection and submitting a certificate of such insurance to the director. By the effective date of these rules the owner or operator must submit to the director a letter from an insurer stating that the insurer is considering issuance of closure insurance conforming to the requirements of this subsection to the owner or operator. Within ninety days after the effective date of these rules, the owner or operator must submit the certificate of insurance to the director or establish other financial assurance as specified in this section. At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(2) The wording of the certificate of insurance must be identical to the wording specified in subsection 11-264-151(e).

(3) The closure insurance policy must be issued for a face amount at least equal to the current closure cost estimate, except as provided in subsection (f). The term ``face amount'' means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer will not change the face amount, although the insurer's future liability will be lowered by the amount of the payments.

(4) The closure insurance policy must guarantee that funds will be available to close the facility whenever final closure occurs. The policy must also guarantee that once final closure begins, the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the director, to such party or parties as the director specifies.

(5) After beginning partial or final closure, an owner or operator or any other person authorized to conduct closure may request reimbursements for closure expenditures by submitting itemized bills to the director. The owner or operator may request

reimbursements for partial closure only if the remaining value of the policy is sufficient to cover the maximum costs of closing the facility over its remaining operating life. Within sixty days after receiving bills for closure activities, the director will instruct the insurer to make reimbursements in such amounts as the director specifies in writing if the director determines that the partial or final closure expenditures are in accordance with the approved closure plan or otherwise justified. If the director has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the face amount of the policy, he may withhold reimbursement of such amounts as he deems prudent until he determines, in accordance with subsection (h), that the owner or operator is no longer required to maintain financial assurance for final closure of the particular facility. If the director does not instruct the insurer to make such reimbursements, he will provide to the owner or operator a detailed written statement of reasons.

(6) The owner or operator must maintain the policy in full force and effect until the director consents to termination of the policy by the owner or operator as specified in paragraph (d)(10). Failure to pay the premium, without substitution of alternate financial assurance as specified in this section, will constitute a significant violation of these rules, warranting such remedy as the director deems necessary. Such violation will be deemed to begin upon receipt by the director of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration.

(7) Each policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

(8) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy must, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the director. Cancellation, termination, or failure to renew may not occur, however, during the one-hundred and twenty days beginning with the date of receipt of the notice by

both the director and the owner or operator, as evidenced by the return receipts. Cancellation, termination, or failure to renew may not occur and the policy will remain in full force and effect in the event that on or before the date of expiration:

(i) The director deems the facility abandoned; or

(ii) Interim status is terminated or revoked; or

(iii) Closure is ordered by the director or a court of competent jurisdiction; or

(iv) The owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code; or

(v) The premium due is paid.

(9) Whenever the current closure cost estimate increases to an amount greater than the face amount of the policy, the owner or operator, within sixty days after the increase, must either cause the face amount to be increased to an amount at least equal to the current closure cost estimate and submit evidence of such increase to the director, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current closure cost estimate decreases, the face amount may be reduced to the amount of the current closure cost estimate following written approval by the director.

(10) The director will give written consent to the owner or operator that he may terminate the insurance policy when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The director releases the owner or operator from the requirements of this section in accordance with subsection (h).

(e) Financial test and corporate guarantee for closure.

(1) An owner or operator may satisfy the requirements of this section by demonstrating that he passes a financial test as specified in this subsection. To pass this test the owner or operator must meet the criteria of either subparagraphs(e)(1)(i) or (e)(1)(ii):

(i) The owner or operator must have:

(A) Two of the following three ratios: A ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

(B) Net working capital and tangible net worth each at least six times the sum of the

current closure and post-closure cost estimates and the current plugging and abandonment cost estimates; and

(C) Tangible net worth of at least $10 million; and

(D) Assets located in the United States amounting to at least ninety percent of total assets or at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates.

(ii) The owner or operator must have:

(A) A current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) Tangible net worth at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates; and

(C) Tangible net worth of at least $10 million; and

(D) Assets located in the United States amounting to at least ninety percent of total assets or at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates.

(2) The phrase ``current closure and post-closure cost estimates'' as used in paragraph (e)(1) refers to the cost estimates required to be shown in paragraphs 1-4 of the letter from the owner's or operator's chief financial officer (subsection 11-264-151(f)). The phrase ``current plugging and abandonment cost estimates'' as used in paragraph (e)(1) refers to the cost estimates required to be shown in paragraphs 1-4 of the letter from the owner's or operator's chief financial officer (40 CFR 144.70(f) (1998)).

(3) To demonstrate that he meets this test, the owner or operator must submit the following items to the director:

(i) A letter signed by the owner's or operator's chief financial officer and worded as specified in subsection 11-264-151(f); and

(ii) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and

(iii) A special report from the owner's or operator's independent certified public accountant to the

owner or operator stating that:

(A) He has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) In connection with that procedure, no matters came to his attention which caused him to believe that the specified data should be adjusted.

(4) The owner or operator may obtain an extension of the time allowed for submission of the documents specified in paragraph (e)(3) if the fiscal year of the owner or operator ends during the ninety days prior to the effective date of these rules and if the year-end financial statements for that fiscal year will be audited by an independent certified public accountant. The extension will end no later than ninety days after the end of the owner's or operator's fiscal year. To obtain the extension, the owner's or operator's chief financial officer must send, by the effective date of these rules, a letter to the director. This letter from the chief financial officer must:

(i) Request the extension;

(ii) Certify that he has grounds to believe that the owner or operator meets the criteria of the financial test;

(iii) Specify for each facility to be covered by the test the EPA identification number, name, address, and current closure and post-closure cost estimates to be covered by the test;

(iv) Specify the date ending the owner's or operator's last complete fiscal year before the effective date of these rules;

(v) Specify the date, no later than ninety days after the end of such fiscal year, when he will submit the documents specified in paragraph (e)(3); and

(vi) Certify that the year-end financial statements of the owner or operator for such fiscal year will be audited by an independent certified public accountant.

(5) After the initial submission of items specified in paragraph (e)(3), the owner or operator must send updated information to the director within ninety days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (e)(3).

(6) If the owner or operator no longer meets the requirements of paragraph (e)(1), he must send notice

to the director of intent to establish alternate financial assurance as specified in this section. The notice must be sent by certified mail within ninety days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator must provide the alternate financial assurance within one-hundred and twenty days after the end of such fiscal year.

(7) The director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraph (e)(1), require reports of financial condition at any time from the owner or operator in addition to those specified in paragraph (e)(3). If the director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of paragraph (e)(1), the owner or operator must provide alternate financial assurance as specified in this section within thirty days after notification of such a finding.

(8) The director may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements (see subparagraph (e)(3)(ii)). An adverse opinion or a disclaimer of opinion will be cause for disallowance. The director will evaluate other qualifications on an individual basis. The owner or operator must provide alternate financial assurance as specified in this section within thirty days after notification of the disallowance.

(9) The owner or operator is no longer required to submit the items specified in paragraph (e)(3) when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The director releases the owner or operator from the requirements of this section in accordance with subsection (h).

(10) An owner or operator may meet the requirements of this section by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (e)(1) through (8) of this section and must comply with the terms of the guarantee. The wording of the guarantee must be

identical to the wording specified in subsection 11-264-151(h). A certified copy of the guarantee must accompany the items sent to the director as specified in paragraph (e)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee. The terms of the guarantee must provide that:

(i) If the owner or operator fails to perform final closure of a facility covered by the corporate guarantee in accordance with the closure plan and other interim status requirements whenever required to do so, the guarantor will do so or establish a trust fund as specified in subsection (a) in the name of the owner or operator.

(ii) The corporate guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the director. Cancellation may not occur, however, during the one-hundred and twenty days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the director, as evidenced by the return receipts.

(iii) If the owner or operator fails to provide alternate financial assurance as specified in this section and obtain the written approval of such alternate assurance from the director within ninety days after receipt by both the owner or operator and the director of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor will provide such alternate financial assurance in the name of the owner or operator.

(f) Use of multiple financial mechanisms. An owner or operator may satisfy the requirements of this section by establishing more than one financial mechanism per facility. These mechanisms are limited to trust funds, surety bonds, letters of credit, and insurance. The mechanisms must be as specified in subsections (a) through (d), respectively, except that it is the combination of mechanisms, rather than the single mechanism, which must provide financial assurance for an amount at least equal to the current closure cost estimate. If an owner or operator uses a trust fund in combination with a surety bond

or a letter of credit, he may use the trust fund as the standby trust fund for the other mechanisms. A single standby trust fund may be established for two or more mechanisms. The director may use any or all of the mechanisms to provide for closure of the facility.

(g) Use of a financial mechanism for multiple facilities. An owner or operator may use a financial assurance mechanism specified in this section to meet the requirements of this section for more than one facility. Evidence of financial assurance submitted to the director must include a list showing, for each facility, the EPA identification number, name, address, and the amount of funds for closure assured by the mechanism. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for closure of any of the facilities covered by the mechanism, the director may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

(h) Release of the owner or operator from the requirements of this section. Within sixty days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the director will notify the owner or operator in writing that he is no longer required by this section to maintain financial assurance for final closure of the facility, unless the director has reason to believe that final closure has not been in accordance with the approved closure plan. The director shall provide the owner or operator a detailed written statement of any such reason to believe that closure has not been in accordance with the approved closure plan. [Eff 6/18/94; am 3/13/99; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.143)

§11-265-144 Cost estimate for post-closure care. (a) The owner or operator of a hazardous waste disposal unit must have a detailed written estimate, in current dollars, of the annual cost of post-closure monitoring and maintenance of the facility in accordance with the applicable post-closure regulations in sections 11-265-117 through 11-265-120, 11-265-228, 11-265-258, 11-265-280, and 11-265-310.

(1) The post-closure cost estimate must be based on the costs to the owner or operator of hiring a third party to conduct post-closure care activities. A third party is a party who is neither a parent nor subsidiary of the owner or operator. (See definition of parent corporation in subsection 11-265-141(d).)

(2) The post-closure cost estimate is calculated by multiplying the annual post-closure cost estimate by the number of years of post-closure care required under section 11-265-117.

(b) During the active life of the facility, the owner or operator must adjust the post-closure cost estimate for inflation within sixty days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with section 11-265-145. For owners or operators using the financial test or corporate guarantee, the post-closure care cost estimate must be updated for inflation no later than thirty days after the close of the firm's fiscal year and before submission of updated information to the director as specified in paragraph 11-265-145(d)(5). The adjustment may be made by recalculating the post-closure cost estimate in current dollars or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its Survey of Current Business as specified in paragraphs 11-265-145(b)(1) and 11-265-145(b)(2). The inflation factor is the result of dividing the latest published annual Deflator by the Deflator for the previous year.

(1) The first adjustment is made by multiplying the post-closure cost estimate by the inflation factor. The result is the adjusted post-closure cost estimate.

(2) Subsequent adjustments are made by multiplying the latest adjusted post-closure cost estimate by the latest inflation factor.

(c) During the active life of the facility, the owner or operator must revise the post-closure cost estimate no later than thirty days after a revision to the post-closure plan which increases the cost of post-closure care. If the owner or operator has an approved post-closure plan, the post-closure cost estimate must be revised no later than thirty days after the director has approved the request to modify the plan, if the change in the post-closure plan increases the cost of post-closure care. The revised post-closure cost estimate must be adjusted for inflation as specified in subsection (b).

(d) The owner or operator must keep the following at the facility during the operating life of the facility: the latest post-closure cost estimate prepared in accordance with subsections (a) and (c) and, when this estimate has been adjusted in accordance with subsection (b), the latest adjusted post-closure cost estimate. [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.144)

§11-265-145 Financial assurance for post-closure care. By the effective date of these rules, an owner or operator of a facility with a hazardous waste disposal unit must establish

financial assurance for post-closure care of the disposal unit(s).

(a) Post-closure trust fund.

(1) An owner or operator may satisfy the requirements of this section by establishing a post-closure trust fund which conforms to the requirements of this subsection and submitting an originally signed duplicate of the trust agreement to the director. The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by the State.

(2) The wording of the trust agreement must be identical to the wording specified in paragraph 11-264-151(a)(1), and the trust agreement must be accompanied by a formal certification of acknowledgment (for example, see paragraph 11-264-151(a)(2)). Schedule A of the trust agreement must be updated within sixty days after a change in the amount of the current post-closure cost estimate covered by the agreement.

(3) Payments into the trust fund must be made annually by the owner or operator over 7 years beginning from June 18, 1994, or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter; this period is hereafter referred to as the "pay-in period." Owners and operators who became subject to the regulations of 40 CFR Part 265 after April 7, 1982, shall make annual payments into the trust fund over a pay-in period of 20 years beginning from the date the owner or operator became subject to the regulations of 40 CFR 265, or over a pay-in period that equals the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter. Owners and operators who become subject to the regulations of this chapter after June 18, 1994, shall make annual payments into the trust fund over a pay-in period of 20 years beginning from the date the owner or operator becomes subject to the regulations of this chapter, or over a pay-in period that equals the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter. The payments into the post-closure trust fund must be made as follows:

(i) The first payment must be made by the effective date of these rules, except as provided in paragraph (a)(5). The first payment must be at least equal to the current post-closure cost estimate, except as provided in subsection (f), divided by the number of years in the pay-in period.

(ii) Subsequent payments must be made no later than

thirty days after each anniversary date of the first payment. The amount of each subsequent payment must be determined by this formula:

$$\text{Next payment} = \frac{CE - CV}{Y}$$

where CE is the current post-closure cost estimate, CV is the current value of the trust fund, and Y is the number of years remaining in the pay-in period.

(4) The owner or operator may accelerate payments into the trust fund or he or she may deposit the full amount of the current post-closure cost estimate at the time the fund is established. However, he or she must maintain the value of the fund at no less than the value that the fund would have if annual payments were made as specified in paragraph (a)(3).

(5) If the owner or operator establishes a post-closure trust fund after having used one or more alternate mechanisms specified in this section, his first payment must be in at least the amount that the fund would contain if the trust fund were established initially and annual payments made as specified in paragraph (a)(3).

(6) After the pay-in period is completed, whenever the current post-closure cost estimate changes during the operating life of the facility, the owner or operator must compare the new estimate with the trustee's most recent annual valuation of the trust fund. If the value of the fund is less than the amount of the new estimate, the owner or operator, within sixty days after the change in the cost estimate, must either deposit an amount into the fund so that its value after this deposit at least equals the amount of the current post-closure cost estimate, or obtain other financial assurance as specified in this section to cover the difference.

(7) During the operating life of the facility, if the value of the trust fund is greater than the total amount of the current post-closure cost estimate, the owner or operator may submit a written request to the director for release of the amount in excess of the current post-closure cost estimate.

(8) If an owner or operator substitutes other financial assurance as specified in this section for all or part of the trust fund, he or she may submit a written request to the director for release of the amount in excess of the current post-closure cost estimate

covered by the trust fund.

(9) Within sixty days after receiving a request from the owner or operator for release of funds as specified in paragraph (a)(7) or (a)(8), the director will instruct the trustee to release to the owner or operator such funds as the director specifies in writing.

(10) During the period of post-closure care, the director may approve a release of funds if the owner or operator demonstrates to the director that the value of the trust fund exceeds the remaining cost of post-closure care.

(11) An owner or operator or any other person authorized to conduct post-closure care may request reimbursements for post-closure expenditures by submitting itemized bills to the director. Within sixty days after receiving bills for post-closure care activities, the director will instruct the trustee to make reimbursements in those amounts as the director specifies in writing, if the director determines that the post-closure expenditures are in accordance with the approved post-closure plan or otherwise justified. If the director does not instruct the trustee to make such reimbursements, he or she will provide the owner or operator with a detailed written statement of reasons.

(12) The director will agree to termination of the trust when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The director releases the owner or operator from the requirements of this section in accordance with subsection (h).

(b) Surety bond guaranteeing payment into a post-closure trust fund.

(1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond which conforms to the requirements of this subsection and submitting the bond to the director. The surety company issuing the bond must, at a minimum, be among those listed as acceptable sureties on Federal bonds in Circular 570 of the U.S. Department of the Treasury.

(2) The wording of the surety bond must be identical to the wording specified in subsection 11-264-151(b).

(3) The owner or operator who uses a surety bond to satisfy the requirements of this section must also establish a standby trust fund. Under the terms of the bond, all payments made thereunder will be deposited by the surety directly into the standby trust fund in accordance with instructions from the director. This

standby trust fund must meet the requirements specified in subsection (a), except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the director with the surety bond; and

(ii) Until the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these rules:

(A) Payments into the trust fund as specified in subsection (a);

(B) Updating of Schedule A of the trust agreement (see subsection 11-264-151(a)) to show current post-closure cost estimates;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The bond must guarantee that the owner or operator will:

(i) Fund the standby trust fund in an amount equal to the penal sum of the bond before the beginning of final closure of the facility; or

(ii) Fund the standby trust fund in an amount equal to the penal sum within fifteen days after an administrative order to begin final closure issued by the director becomes final, or within fifteen days after an order to begin final closure is issued by a court of competent jurisdiction; or

(iii) Provide alternate financial assurance as specified in this section, and obtain the director's written approval of the assurance provided, within ninety days after receipt by both the owner or operator and the director of a notice of cancellation of the bond from the surety.

(5) Under the terms of the bond, the surety will become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond.

(6) The penal sum of the bond must be in an amount at least equal to the current post-closure cost estimate, except as provided in subsection (f).

(7) Whenever the current post-closure cost estimate increases to an amount greater than the penal sum, the owner or operator, within sixty days after the increase, must either cause the penal sum to be increased to an amount at least equal to the current post-closure cost estimate and submit evidence of such increase to the director, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current post-closure cost estimate decreases, the penal sum may be reduced to the

amount of the current post-closure cost estimate following written approval by the director.

(8) Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the director. Cancellation may not occur, however, during the one-hundred and twenty days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the director, as evidenced by the return receipts.

(9) The owner or operator may cancel the bond if the director has given prior written consent based on his receipt of evidence of alternate financial assurance as specified in this section.

(c) Post-closure letter of credit.

(1) An owner or operator may satisfy the requirements of this section by obtaining an irrevocable standby letter of credit which conforms to the requirements of this subsection and submitting the letter to the director. The issuing institution must be an entity which has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or State agency.

(2) The wording of the letter of credit must be identical to the wording specified in subsection 11-264-151(d).

(3) An owner or operator who uses a letter of credit to satisfy the requirements of this section must also establish a standby trust fund. Under the terms of the letter of credit, all amounts paid pursuant to a draft by the director will be deposited by the issuing institution directly into the standby trust fund in accordance with instructions from the director. This standby trust fund must meet the requirements of the trust fund specified in subsection (a), except that:

(i) An originally signed duplicate of the trust agreement must be submitted to the director with the letter of credit; and

(ii) Unless the standby trust fund is funded pursuant to the requirements of this section, the following are not required by these rules:

(A) Payments into the trust fund as specified in subsection (a);

(B) Updating of Schedule A of the trust agreement (see subsection 11-264-151(a)) to show current post-closure cost estimates;

(C) Annual valuations as required by the trust agreement; and

(D) Notices of nonpayment as required by the trust agreement.

(4) The letter of credit must be accompanied by a letter

from the owner or operator referring to the letter of credit by number, issuing institution, and date, and providing the following information: The EPA identification number, name, and address of the facility, and the amount of funds assured for post-closure care of the facility by the letter of credit.

(5) The letter of credit must be irrevocable and issued for a period of at least one year. The letter of credit must provide that the expiration date will be automatically extended for a period of at least one year unless, at least one-hundred and twenty days before the current expiration date, the issuing institution notifies both the owner or operator and the director by certified mail of a decision not to extend the expiration date. Under the terms of the letter of credit, the one-hundred and twenty days will begin on the date when both the owner or operator and the director have received the notice, as evidenced by the return receipts.

(6) The letter of credit must be issued in an amount at least equal to the current post-closure cost estimate, except as provided in subsection (f).

(7) Whenever the current post-closure cost estimate increases to an amount greater than the amount of the credit during the operating life of the facility, the owner or operator, within sixty days after the increase, must either cause the amount of the credit to be increased so that it at least equals the current post-closure cost estimate and submit evidence of such increase to the director, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current post-closure cost estimate decreases during the operating life of the facility, the amount of the credit may be reduced to the amount of the current post-closure cost estimate following written approval by the director.

(8) During the period of post-closure care, the director may approve a decrease in the amount of the letter of credit if the owner or operator demonstrates to the director that the amount exceeds the remaining cost of post-closure care.

(9) Following an administrative or judicial determination pursuant to HRS section 342J-7 that the owner or operator has failed to perform post-closure care in accordance with the approved post-closure plan and other permit requirements, the director may draw on the letter of credit.

(10) If the owner or operator does not establish alternate financial assurance as specified in this section and

obtain written approval of such alternate assurance from the director within ninety days after receipt by both the owner or operator and the director of a notice from the issuing institution that it has decided not to extend the letter of credit beyond the current expiration date, the director will draw on the letter of credit. The director may delay the drawing if the issuing institution grants an extension of the term of the credit. During the last thirty days of any such extension the director will draw on the letter of credit if the owner or operator has failed to provide alternate financial assurance as specified in this section and obtain written approval of such assurance from the director.

(11) The director will return the letter of credit to the issuing institution for termination when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The director releases the owner or operator from the requirements of this section in accordance with subsection (h).

(d) Post-closure insurance.

(1) An owner or operator may satisfy the requirements of this section by obtaining post-closure insurance which conforms to the requirements of this subsection and submitting a certificate of such insurance to the director. By the effective date of these rules the owner or operator must submit to the director a letter from an insurer stating that the insurer is considering issuance of post-closure insurance conforming to the requirements of this subsection to the owner or operator. Within ninety days after the effective date of these rules, the owner or operator must submit the certificate of insurance to the director or establish other financial assurance as specified in this section. At a minimum, the insurer must be licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(2) The wording of the certificate of insurance must be identical to the wording specified in subsection 11-264-151(e).

(3) The post-closure insurance policy must be issued for a face amount at least equal to the current post-closure cost estimate, except as provided in subsection (f). The term ``face amount'' means the total amount the insurer is obligated to pay under the policy. Actual payments by the insurer will not change the face amount, although the insurer's future liability will be

lowered by the amount of the payments.

(4) The post-closure insurance policy must guarantee that funds will be available to provide post-closure care of the facility whenever the post-closure period begins. The policy must also guarantee that once post-closure care begins the insurer will be responsible for paying out funds, up to an amount equal to the face amount of the policy, upon the direction of the director, to such party or parties as the director specifies.

(5) An owner or operator or any other person authorized to perform post-closure care may request reimbursement for post-closure care expenditures by submitting itemized bills to the director. Within sixty days after receiving bills for post-closure care activities, the director will instruct the insurer to make reimbursements in those amounts as the director specifies in writing, if the director determines that the post-closure expenditures are in accordance with the approved post-closure plan or otherwise justified. If the director does not instruct the insurer to make such reimbursements, he will provide a detailed written statement of reasons.

(6) The owner or operator must maintain the policy in full force and effect until the director consents to termination of the policy by the owner or operator as specified in paragraph (d)(11). Failure to pay the premium, without substitution of alternate financial assurance as specified in this section, will constitute a significant violation of these rules, warranting such remedy as the director deems necessary. Such violation will be deemed to begin upon receipt by the director of a notice of future cancellation, termination, or failure to renew due to nonpayment of the premium, rather than upon the date of expiration.

(7) Each policy must contain a provision allowing assignment of the policy to a successor owner or operator. Such assignment may be conditional upon consent of the insurer, provided such consent is not unreasonably refused.

(8) The policy must provide that the insurer may not cancel, terminate, or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy must, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy. If there is a failure to pay the premium, the insurer may elect to cancel, terminate, or fail to renew the policy by sending notice by certified mail to the owner or operator and the director. Cancellation, termination, or failure to renew may not occur, however, during the one-hundred and twenty days

beginning with the date of receipt of the notice by both the director and the owner or operator, as evidenced by the return receipts. Cancellation, termination, or failure to renew may not occur and the policy will remain in full force and effect in the event that on or before the date of expiration:

(i) The director deems the facility abandoned; or

(ii) Interim status is terminated or revoked; or

(iii) Closure is ordered by the director or a court of competent jurisdiction; or

(iv) The owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code; or

(v) The premium due is paid.

(9) Whenever the current post-closure cost estimate increases to an amount greater than the face amount of the policy during the operating life of the facility, the owner or operator, within sixty days after the increase, must either cause the face amount to be increased to an amount at least equal to the current post-closure cost estimate and submit evidence of such increase to the director, or obtain other financial assurance as specified in this section to cover the increase. Whenever the current post-closure cost estimate decreases during the operating life of the facility, the face amount may be reduced to the amount of the current post-closure cost estimate following written approval by the director.

(10) Commencing on the date that liability to make payments pursuant to the policy accrues, the insurer will thereafter annually increase the face amount of the policy. Such increase must be equivalent to the face amounts of the policy, less any payments made, multiplied by an amount equivalent to eighty-five percent of the most recent investment rate or of the equivalent coupon-issue yield announced by the U.S. Treasury for twenty-six week Treasury securities.

(11) The director will give written consent to the owner or operator that he may terminate the insurance policy when:

(i) An owner or operator substitutes alternate financial assurance as specified in this section; or

(ii) The director releases the owner or operator from the requirements of this section in accordance with subsection (h).

(e) Financial test and corporate guarantee for post-closure care.

(1) An owner or operator may satisfy the requirements of this section by demonstrating that he passes a

financial test as specified in this subsection. To pass this test the owner or operator must meet the criteria either of subparagraph (e)(1)(i) or (e)(1)(ii):

(i) The owner or operator must have:

(A) Two of the following three ratios: a ratio of total liabilities to net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

(B) Net working capital and tangible net worth each at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates; and

(C) Tangible net worth of at least $10 million; and

(D) Assets in the United States amounting to at least ninety percent of his total assets or at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates.

(ii) The owner or operator must have:

(A) A current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) Tangible net worth at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates; and

(C) Tangible net worth of at least $10 million; and

(D) Assets located in the United States amounting to at least ninety percent of his total assets or at least six times the sum of the current closure and post-closure cost estimates and the current plugging and abandonment cost estimates.

(2) The phrase ``current closure and post-closure cost estimates'' as used in paragraph (e)(1) refers to the cost estimates required to be shown in paragraphs 1-4 of the letter from the owner's or operator's chief financial officer (subsection 11-264-151(f)). The phrase ``current plugging and abandonment cost estimates'' as used in paragraph (e)(1) refers to the cost estimates required to be shown in paragraphs 1-4 of the letter from the owner's or operator's chief

financial officer (40 CFR 144.70(f) (1998)).

(3) To demonstrate that he meets this test, the owner or operator must submit the following items to the director:

(i) A letter signed by the owner's or operator's chief financial officer and worded as specified in subsection 11-264-151(f); and

(ii) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year; and

(iii) A special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) He has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) In connection with that procedure, no matters came to his attention which caused him to believe that the specified data should be adjusted.

(4) The owner or operator may obtain an extension of the time allowed for submission of the documents specified in paragraph (e)(3) if the fiscal year of the owner or operator ends during the ninety days prior to the effective date of these rules and if the year-end financial statements for that fiscal year will be audited by an independent certified public accountant. The extension will end no later than ninety days after the end of the owner's or operator's fiscal year. To obtain the extension, the owner's or operator's chief financial officer must send, by the effective date of these rules, a letter to the director. This letter from the chief financial officer must:

(i) Request the extension;

(ii) Certify that he has grounds to believe that the owner or operator meets the criteria of the financial test;

(iii) Specify for each facility to be covered by the test the EPA identification number, name, address, and the current closure and post-closure cost estimates to be covered by the test;

(iv) Specify the date ending the owner's or operator's latest complete fiscal year before the effective date of these rules;

(v) Specify the date, no later than ninety days after the end of such fiscal year, when he will submit

the documents specified in paragraph (e)(3); and

(vi) Certify that the year-end financial statements of the owner or operator for such fiscal year will be audited by an independent certified public accountant.

(5) After the initial submission of items specified in paragraph (e)(3), the owner or operator must send updated information to the director within ninety days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (e)(3).

(6) If the owner or operator no longer meets the requirements of paragraph (e)(1), he must send notice to the director of intent to establish alternate financial assurance as specified in this section. The notice must be sent by certified mail within ninety days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the requirements. The owner or operator must provide the alternate financial assurance within one-hundred and twenty days after the end of such fiscal year.

(7) The director may, based on a reasonable belief that the owner or operator may no longer meet the requirements of paragraph (e)(1), require reports of financial condition at any time from the owner or operator in addition to those specified in paragraph (e)(3). If the director finds, on the basis of such reports or other information, that the owner or operator no longer meets the requirements of paragraph (e)(1), the owner or operator must provide alternate financial assurance as specified in this section within thirty days after notification of such a finding.

(8) The director may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements (see subparagraph (e)(3)(ii)). An adverse opinion or a disclaimer of opinion will be cause for disallowance. The director will evaluate other qualifications on an individual basis. The owner or operator must provide alternate financial assurance as specified in this section within thirty days after notification of the disallowance.

(9) During the period of post-closure care, the director may approve a decrease in the current post-closure cost estimate for which this test demonstrates financial assurance if the owner or operator demonstrates to the director that the amount of the cost estimate exceeds the remaining cost of post-closure care.

(10) The owner or operator is no longer required to submit the items specified in paragraph (e)(3) when:
  (i) An owner or operator substitutes alternate financial assurance as specified in this section; or
  (ii) The director releases the owner or operator from the requirements of this section in accordance with subsection (h).

(11) An owner or operator may meet the requirements of this section by obtaining a written guarantee. The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a "substantial business relationship" with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (e)(1) through (9) of this section and must comply with the terms of the guarantee. The wording of the guarantee must be identical to the wording specified in subsection 11-264-151(h). A certified copy of the guarantee must accompany the items sent to the director as specified in paragraph (e)(3) of this section. One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, the letter must describe the value received in consideration of the guarantee. If the guarantor is a firm with a "substantial business relationship" with the owner or operator, this letter must describe this "substantial business relationship" and the value received in consideration of the guarantee. The terms of the guarantee must provide that:
  (i) If the owner or operator fails to perform post-closure care of a facility covered by the corporate guarantee in accordance with the post-closure plan and other interim status requirements whenever required to do so, the guarantor will do so or establish a trust fund as specified in subsection (a) in the name of the owner or operator.
  (ii) The corporate guarantee will remain in force unless the guarantor sends notice of cancellation by certified mail to the owner or operator and to the director. Cancellation may not occur, however, during the one-hundred and twenty days beginning on the date of receipt of the notice of cancellation by both the owner or operator and the director, as evidenced by the return receipts.

(iii) If the owner or operator fails to provide alternate financial assurance as specified in this section and obtain the written approval of such alternate assurance from the director within ninety days after receipt by both the owner or operator and the director of a notice of cancellation of the corporate guarantee from the guarantor, the guarantor will provide such alternate financial assurance in the name of the owner or operator.

(f) Use of multiple financial mechanisms. An owner or operator may satisfy the requirements of this section by establishing more than one financial mechanism per facility. These mechanisms are limited to trust funds, surety bonds, letters of credit, and insurance. The mechanisms must be as specified in subsections (a) through (d), respectively, except that it is the combination of mechanisms, rather than the single mechanism, which must provide financial assurance for an amount at least equal to the current post-closure cost estimate. If an owner or operator uses a trust fund in combination with a surety bond or a letter of credit, he may use the trust fund as the standby trust fund for the other mechanisms. A single standby trust fund may be established for two or more mechanisms. The director may use any or all of the mechanisms to provide for post-closure care of the facility.

(g) Use of a financial mechanism for multiple facilities. An owner or operator may use a financial assurance mechanism specified in this section to meet the requirements of this section for more than one facility. Evidence of financial assurance submitted to the director must include a list showing, for each facility, the EPA identification number, name, address, and the amount of funds for post-closure care assured by the mechanism. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for each facility. In directing funds available through the mechanism for post-closure care of any of the facilities covered by the mechanism, the director may direct only the amount of funds designated for that facility, unless the owner or operator agrees to the use of additional funds available under the mechanism.

(h) Release of the owner or operator from the requirements of this section. Within sixty days after receiving certifications from the owner or operator and an independent registered professional engineer that the post-closure care period has been completed in accordance with the approved post-closure plan, the director will notify the owner or operator in writing that he is no longer required by this section to maintain financial assurance for post-closure care of that unit, unless the director has reason to believe that post-closure care has not been in accordance with the approved post-closure plan. The director will

provide the owner or operator a detailed written statement of any such reason to believe that post-closure care has not been in accordance with the approved post-closure plan. [Eff 6/18/94; am 3/13/99; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.145)

§11-265-146 Use of a mechanism for financial assurance of both closure and post-closure care. An owner or operator may satisfy the requirements for financial assurance for both closure and post-closure care for one or more facilities by using a trust fund, surety bond, letter of credit, insurance, financial test, or corporate guarantee that meets the specifications for the mechanism in both sections 11-265-143 and 11-265-145. The amount of funds available through the mechanism must be no less than the sum of funds that would be available if a separate mechanism had been established and maintained for financial assurance of closure and of post-closure care. [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.146)

§11-265-147 Liability requirements. (a) Coverage for sudden accidental occurrences. An owner or operator of a hazardous waste treatment, storage, or disposal facility, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs. This liability coverage may be demonstrated as specified in paragraph (a)(1), (a)(2), (a)(3), (a)(4), (a)(5), or (a)(6):

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this subsection.

(i) Each insurance policy must be amended by attachment of the Hazardous Waste Facility Liability Endorsement, or evidenced by a Certificate of Liability Insurance. The wording of the endorsement must be identical to the wording specified in subsection 11-264-151(i). The wording of the certificate of insurance must be identical to the wording specified in subsection 11-264-151(j). The owner or operator must submit a signed duplicate original of the endorsement or the certificate of insurance to the director. If requested by the director, the owner

or operator must provide a signed duplicate original of the insurance policy.

(ii) Each insurance policy must be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or eligble to provide insurance as an excess or surplus lines insurer, in one or more states.

(2) An owner or operator may meet the requirements of this section by passing a financial test or using the guarantee for liability coverage as specified in subsections (f) and (g).

(3) An owner or operator may meet the requirements of this section by obtaining a letter of credit for liability coverage as specified in subsection (h).

(4) An owner or operator may meet the requirements of this section by obtaining a surety bond for liability coverage as specified in subsection (i).

(5) An owner or operator may meet the requirements of this section by obtaining a trust fund for liability coverage as specified in subsection (j).

(6) An owner or operator may demonstrate the required liability coverage through the use of combinations of insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated must total at least the minimum amounts required by this section. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this subsection, the owner or operator shall specify at least one such assurance as ``primary'' coverage and shall specify other assurance as ``excess'' coverage.

(7) An owner or operator shall notify the director in writing within 30 days whenever:

(i) A claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized in paragraphs (a)(1) through (a)(6) of this section; or

(ii) A Certification of Valid Claim for bodily injury or property damages caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is entered between the owner or operator and third-party claimant for liability coverage under paragraphs (a)(1) through (a)(6) of

this section; or

(iii) A final court order establishing a judgment for bodily injury or property damage caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage under paragraphs (a)(1) through (a)(6) of this section.

(b) Coverage for nonsudden accidental occurrences. An owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by nonsudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for nonsudden accidental occurrences in the amount of at least $3 million per occurrence with an annual aggregate of at least $6 million, exclusive of legal defense costs. An owner or operator who must meet the requirements of this section may combine the required per-occurrence coverage levels for sudden and nonsudden accidental occurrences into a single per-occurrence level, and combine the required annual aggregate coverage levels for sudden and nonsudden accidental occurrences into a single annual aggregate level. Owners or operators who combine coverage levels for sudden and nonsudden accidental occurrences must maintain liability coverage in the amount of at least $4 million per occurrence and $8 million annual aggregate. This liability coverage may be demonstrated as specified in paragraph (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), or (b)(6):

(1) An owner or operator may demonstrate the required liability coverage by having liability insurance as specified in this subsection.

(2) An owner or operator may meet the requirements of this section by passing a financial test or using the guarantee for liability coverage as specified in subsections (f) and (g).

(3) An owner or operator may meet the requirements of this section by obtaining a letter of credit for liability coverage as specified in subsection (h).

(4) An owner or operator may meet the requirements of this section by obtaining a surety bond for liability coverage as specified in subsection (i).

(5) An owner or operator may meet the requirements of this section by obtaining a trust fund for liability coverage as specified in subsection (j).

(6) An owner or operator may demonstrate the required liability coverage through the use of combinations of

insurance, financial test, guarantee, letter of credit, surety bond, and trust fund, except that the owner or operator may not combine a financial test covering part of the liability coverage requirement with a guarantee unless the financial statement of the owner or operator is not consolidated with the financial statement of the guarantor. The amounts of coverage demonstrated must total at least the minimum amounts required by this section. If the owner or operator demonstrates the required coverage through the use of a combination of financial assurances under this subsection, the owner or operator shall specify at least one such assurance as ``primary'' coverage and shall specify other assurance as ``excess'' coverage.

(7) An owner or operator shall notify the director in writing within 30 days whenever:

(i) A claim results in a reduction in the amount of financial assurance for liability coverage provided by a financial instrument authorized in paragraphs (b)(1) through (b)(6) of this section; or

(ii) A Certification of Valid Claim for bodily injury or property damages caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is entered between the owner or operator and third-party claimant for liability coverage under paragraphs (b)(1) through (b)(6) of this section; or

(iii) A final court order establishing a judgment for bodily injury or property damage caused by a sudden or non-sudden accidental occurrence arising from the operation of a hazardous waste treatment, storage, or disposal facility is issued against the owner or operator or an instrument that is providing financial assurance for liability coverage under paragraphs (b)(1) through (b)(6) of this section.

(c) Request for variance. If an owner or operator can demonstrate to the satisfaction of the director that the levels of financial responsibility required by subsection (a) or (b) are not consistent with the degree and duration of risk associated with treatment, storage, or disposal at the facility or group of facilities, the owner or operator may obtain a variance from the director. The request for a variance must be submitted in writing to the director. If granted, the variance will take the form of an adjusted level of required liability coverage, such level to be based on the director's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. The director may require an

owner or operator who requests a variance to provide such technical and engineering information as is deemed necessary by the director to determine a level of financial responsibility other than that required by subsection (a) or (b). The director will process a variance request as if it were a permit modification request under paragraph 11-270-41(a)(5) and subject to the procedures of section 11-271-5. Notwithstanding any other provision, the director may hold a public hearing at his discretion or whenever he finds, on the basis of requests for a public hearing, a significant degree of public interest in a tentative decision to grant a variance.

(d) Adjustments by the director. If the director determines that the levels of financial responsibility required by subsection (a) or (b) are not consistent with the degree and duration of risk associated with treatment, storage, or disposal at the facility or group of facilities, the director may adjust the level of financial responsibility required under subsection (a) or (b) as may be necessary to protect human health and the environment. This adjusted level will be based on the director's assessment of the degree and duration of risk associated with the ownership or operation of the facility or group of facilities. In addition, if the director determines that there is a significant risk to human health and the environment from nonsudden accidental occurrences resulting from the operations of a facility that is not a surface impoundment, landfill, or land treatment facility, he may require that an owner or operator of the facility comply with subsection (b). An owner or operator must furnish to the director, within a reasonable time, any information which the director requests to determine whether cause exists for such adjustments of level or type of coverage. The director will process an adjustment of the level of required coverage as if it were a permit modification under paragraph 11-270-41(a)(5) and subject to the procedures of section 11-271-5. Notwithstanding any other provision, the director may hold a public hearing at his discretion or whenever he finds, on the basis of requests for a public hearing, a significant degree of public interest in a tentative decision to adjust the level or type of required coverage.

(e) Period of coverage. Within sixty days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the director will notify the owner or operator in writing that he is no longer required by this section to maintain liability coverage for that facility, unless the director has reason to believe that closure has not been in accordance with the approved closure plan.

(f) Financial test for liability coverage.

(1) An owner or operator may satisfy the requirements of this section by demonstrating that he passes a

financial test as specified in this subsection. To pass this test the owner or operator must meet the criteria of subparagraph (f)(1)(i) or (f)(1)(ii):

(i) The owner or operator must have:

(A) Net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

(B) Tangible net worth of at least $10 million; and

(C) Assets in the United States amounting to either:

(1) At least ninety percent of his total assets; or

(2) At least six times the amount of liability coverage to be demonstrated by this test.

(ii) The owner or operator must have:

(A) A current rating for his most recent bond issuance of AAA, AA, A, or BBB as issued by Standard and Poor's, or Aaa, Aa, A, or Baa as issued by Moody's; and

(B) Tangible net worth of at least $10 million; and

(C) Tangible net worth at least six times the amount of liability coverage to be demonstrated by this test; and

(D) Assets in the United States amounting to either:

(1) At least ninety percent of his total assets; or

(2) At least six times the amount of liability coverage to be demonstrated by this test.

(2) The phrase ``amount of liability coverage'' as used in paragraph (f)(1) refers to the annual aggregate amounts for which coverage is required under subsections (a) and (b).

(3) To demonstrate that he meets this test, the owner or operator must submit the following three items to the director:

(i) A letter signed by the owner's or operator's chief financial officer and worded as specified in subsection 11-264-151(g). If an owner or operator is using the financial test to demonstrate both assurance for closure or post-closure care, as specified by subsections 11-264-143(f), 11-264-145(f), 11-265-143(e), and 11-265-145(e), and liability coverage, he must submit the letter specified in subsection 11-264-151(g) to cover

both forms of financial responsibility; a separate letter as specified in subsection 11-264-151(f) is not required.

(ii) A copy of the independent certified public accountant's report on examination of the owner's or operator's financial statements for the latest completed fiscal year.

(iii) A special report from the owner's or operator's independent certified public accountant to the owner or operator stating that:

(A) He has compared the data which the letter from the chief financial officer specifies as having been derived from the independently audited, year-end financial statements for the latest fiscal year with the amounts in such financial statements; and

(B) In connection with that procedure, no matters came to his attention which caused him to believe that the specified data should be adjusted.

(4) The owner or operator may obtain a one-time extension of the time allowed for submission of the documents specified in paragraph (f)(3) if the fiscal year of the owner or operator ends during the ninety days prior to the effective date of these rules and if the year-end financial statements for that fiscal year will be audited by an independent certified public accountant. The extension will end no later than ninety days after the end of the owner's or operator's fiscal year. To obtain the extension, the owner's or operator's chief financial officer must send, by the effective date of these rules, a letter to the director. This letter from the chief financial officer must:

(i) Request the extension;

(ii) Certify that he has grounds to believe that the owner or operator meets the criteria of the financial test;

(iii) Specify for each facility to be covered by the test the EPA identification number, name, address, the amount of liability coverage and, when applicable, current closure and post-closure cost estimates to be covered by the test;

(iv) Specify the date ending the owner's or operator's last complete fiscal year before the effective date of these rules;

(v) Specify the date, no later than ninety days after the end of such fiscal year, when he will submit the documents specified in paragraph (f)(3); and

(vi) Certify that the year-end financial statements of the owner or operator for such fiscal year will be

audited by an independent certified public accountant.

(5) After the initial submission of items specified in paragraph (f)(3), the owner or operator must send updated information to the director within ninety days after the close of each succeeding fiscal year. This information must consist of all three items specified in paragraph (f)(3).

(6) If the owner or operator no longer meets the requirements of paragraph (f)(1) of this section, he must obtain insurance, a letter of credit, a surety bond, a trust fund, or a guarantee for the entire amount of required liability coverage as specified in this section. Evidence of liability coverage must be submitted to the director within 90 days after the end of the fiscal year for which the year-end financial data show that the owner or operator no longer meets the test requirements.

(7) The director may disallow use of this test on the basis of qualifications in the opinion expressed by the independent certified public accountant in his report on examination of the owner's or operator's financial statements (see subparagraph (f)(3)(ii)). An adverse opinion or a disclaimer of opinion will be cause for disallowance. The director will evaluate other qualifications on an individual basis. The owner or operator must provide evidence of insurance for the entire amount of required liability coverage as specified in this section within thirty days after notification of disallowance.

(g) Guarantee for liability coverage.

(1) Subject to paragraph (g)(2), an owner or operator may meet the requirements of this section by obtaining a written guarantee, hereinafter referred to as ``guarantee.'' The guarantor must be the direct or higher-tier parent corporation of the owner or operator, a firm whose parent corporation is also the parent corporation of the owner or operator, or a firm with a ``substantial business relationship'' with the owner or operator. The guarantor must meet the requirements for owners or operators in paragraphs (f)(1) through (f)(6). The wording of the guarantee must be identical to the wording specified in paragraph 11-264-151(h)(2). A certified copy of the guarantee must accompany the items sent to the director as specified in paragraph (f)(3). One of these items must be the letter from the guarantor's chief financial officer. If the guarantor's parent corporation is also the parent corporation of the owner or operator, this letter must describe the value received in

consideration of the guarantee. If the guarantor is a firm with a ``substantial business relationship'' with the owner or operator, this letter must describe this ``substantial business relationship'' and the value received in consideration of the guarantee.

(i) If the owner or operator fails to satisfy a judgment based on a determination of liability for bodily injury or property damage to third parties caused by sudden or nonsudden accidental occurrences (or both as the case may be), arising from the operation of facilities covered by this corporate guarantee, or fails to pay an amount agreed to in settlement of claims arising from or alleged to arise from such injury or damage, the guarantor will do so up to the limits of coverage.

(ii) [Reserved]

(2) (i) In the case of corporations incorporated in the United States, a guarantee may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of:

(A) the state in which the guarantor is incorporated, and

(B) the State of Hawaii

have submitted written statements to the director that a guarantee executed as described in this section and paragraph 11-264-151(h)(2) is a legally valid and enforceable obligation in the state in which the guarantor is incorporated and in the State of Hawaii, respectively.

(ii) In the case of corporations incorporated outside the United States, a guarantee may be used to satisfy the requirements of this section only if:

(A) the non-U.S. corporation has identified a registered agent for service of process in the State of Hawaii and in the state in which it has its principal place of business, and if:

(B) the Attorneys General or Insurance Commissioners of the State of Hawaii and the state in which the guarantor corporation has its principal place of business, have submitted written statements to the director that a guarantee executed as described in this section and paragraph 11-264-151(h)(2) is a legally valid and enforceable obligation in the State of Hawaii and in the state in which the guarantor corporation has its principal place of business, respectively.

(h) Letter of credit for liability coverage.

(1) An owner or operator may satisfy the requirements of

this section by obtaining an irrevocable standby letter of credit that conforms to the requirements of this subsection and submitting a copy of the letter of credit to the director.

(2) The financial institution issuing the letter of credit must be an entity that has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a federal or State agency.

(3) The wording of the letter of credit must be identical to the wording specified in subsection 11-264-151(k).

(4) An owner or operator who uses a letter of credit to satisfy the requirements of this section may also establish a standby trust fund. Under the terms of such a letter of credit, all amounts paid pursuant to a draft by the trustee of the standby trust will be deposited by the issuing institution into the standby trust in accordance with instructions from the trustee. The trustee of the standby trust fund must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by the State.

(5) The wording of the standby trust fund must be identical to the wording specified in subsection 11-264-151(n).

(i) Surety bond for liability coverage.

(1) An owner or operator may satisfy the requirements of this section by obtaining a surety bond that conforms to the requirements of this subsection and submitting a copy of the bond to the director.

(2) The surety company issuing the bond must be among those listed as acceptable sureties on Federal bonds in the most recent Circular 570 of the U.S. Department of the Treasury.

(3) The wording of the surety bond must be identical to the wording specified in subsection 11-264-151(l) .

(4) A surety bond may be used to satisfy the requirements of this section only if the Attorneys General or Insurance Commissioners of:

(i) The state in which the surety is incorporated; and

(ii) the State of Hawaii

have submitted written statements to the director that a surety bond executed as described in this section and subsection 11-264-151(l) is a legally valid and enforceable obligation in the state in which the surety is incorporated and in the State of Hawaii, respectively.

(j) Trust fund for liability coverage.

(1) An owner or operator may satisfy the requirements of this section by establishing a trust fund that conforms to the requirements of this subsection and submitting

an originally signed duplicate of the trust agreement to the director.

(2) The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by the State.

(3) The trust fund for liability coverage must be funded for the full amount of the liability coverage to be provided by the trust fund before it may be relied upon to satisfy the requirements of this section. If at any time after the trust fund is created the amount of funds in the trust fund is reduced below the full amount of the liability coverage to be provided, the owner or operator, by the anniversary date of the establishment of the Fund, must either add sufficient funds to the trust fund to cause its value to equal the full amount of liability coverage to be provided, or obtain other financial assurance as specified in this section to cover the difference. For purposes of this paragraph, ``the full amount of the liability coverage to be provided'' means the amount of coverage for sudden and/or nonsudden occurrences required to be provided by the owner or operator by this section, less the amount of financial assurance for liability coverage that is being provided by other financial assurance mechanisms being used to demonstrate financial assurance by the owner or operator.

(4) The wording of the trust fund must be identical to the wording specified in subsection 11-264-151(m).

(k) [Reserved] [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.147)

§11-265-148 Incapacity of owners or operators, guarantors, or financial institutions. (a) An owner or operator must notify the director by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming the owner or operator as debtor, within ten days after commencement of the proceeding. A guarantor of a corporate guarantee as specified in subsections 11-265-143(e) and 11-265-145(e) must make such a notification if he is named as debtor, as required under the terms of the corporate guarantee (subsection 11-264-151(h)).

(b) An owner or operator who fulfills the requirements of section 11-265-143, section 11-265-145, or section 11-265-147 by obtaining a trust fund, surety bond, letter of credit, or insurance policy will be deemed to be without the required financial assurance or liability coverage in the event of bankruptcy of the trustee or issuing institution, or a suspension or revocation of the authority of the trustee institution to act

as trustee or of the institution issuing the surety bond, letter of credit, or insurance policy to issue such instruments. The owner or operator must establish other financial assurance or liability coverage within sixty days after such an event. [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.148)

§11-265-149 [Reserved]

§11-265-150 [Reserved]

SUBCHAPTER I

USE AND MANAGEMENT OF CONTAINERS

§11-265-170 Applicability. The rules in this subchapter apply to owners and operators of all hazardous waste facilities that store containers of hazardous waste, except as section 11-265-1 provides otherwise. [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.170)

§11-265-171 Condition of containers. If a container holding hazardous waste is not in good condition, or if it begins to leak, the owner or operator must transfer the hazardous waste from this container to a container that is in good condition, or manage the waste in some other way that complies with the requirements of this chapter. [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.171)

§11-265-172 Compatibility of waste with container. The owner or operator must use a container made of or lined with materials which will not react with, and are otherwise compatible with, the hazardous waste to be stored, so that the ability of the container to contain the waste is not impaired. [Eff 6/18/94; comp] (Auth: HRS §§342J-4, 342J-31, 342J-34, 342J-35) (Imp: 40 C.F.R. §265.172)